

PERIODIC REVIEW BOARDS FOR LAW-OF-WAR DETENTION IN GUANTANAMO: WHAT NEXT?

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I. INTRODUCTION

The 2016 presidential election has led to a great deal of uncertainty about future United States policies and practices, particularly for those who work in the field of the Law of Armed Conflict (LOAC) or International Humanitarian Law (IHL), as it is alternatively called.¹ In particular, the future of the Department of Defense detention facility at Guantanamo Bay Naval Station (Guantanamo) raises questions since many of the existing

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1. *What is International Humanitarian Law?*, ICRC (July 1, 2004), https://www.icrc.org/en/assets/files/other/what_is_ihl.pdf. The Law of Armed Conflict (LOAC) and International Humanitarian Law (IHL) are two names for the same body of law, which includes the Geneva Conventions of 1949 and the Additional Protocols of 1977.

processes and conditions were established as a matter of policy, rather than law, and therefore could potentially be scrapped on a whim.² One very important example of this, and the subject matter of this paper, is that Guantanamo detainees are currently entitled to periodic reviews on the necessity of their continued detention by the United States.³ Reviews of the necessity of detention are explicitly foreseen by IHL, but the rules for detainees captured in relation to a non-international armed conflict (NIAC) are unclear.⁴ At least as a matter of policy, the United States has always provided reviews to NIAC detainees, but each iteration has been quite different.⁵

The so-called “Periodic Review Boards” (PRBs) are the latest iteration of review processes provided to the detainees in Guantanamo.⁶ Through this process, detainees deemed not to pose a significant threat to United States security are placed on a transferable list at which point the State Department searches for repatriation or resettlement options.⁷ The Executive Order issued by President Trump on January 30th, 2018, confirmed the continuation of the PRBs for current Guantanamo detainees and extended them to any potential new arrivals.⁸ In this author’s view, PRBs are the most transparent and consistent with international legal principles in comparison to previous review processes, but serious flaws remain and should be addressed, including issues related to independence, impartiality and the protection against self-incrimination. Should these flaws be directly addressed, the PRBs could provide an efficient and meaningful way of ensuring detainees are not held any longer than is absolutely necessary (i.e., only as long as such individuals pose an imperative threat to security). These processes are not a substitute for continued access to the courts through the writ of *habeas corpus*, but as *habeas* has been ruled not to apply in similar cases to battlefield zones like

2. Here the author does not refer to minimum conditions to meet humane treatment standards under Common Article 3 of the Geneva Conventions of 1949 or other legal standards that may apply, but rather other policies as review processes or transfers from Guantanamo.

3. *Periodic Review Secretariat*, U.S. DEP’T OF DEF., <http://www.prs.mil/> (last visited Jan. 29, 2018) [hereinafter U.S. DEP’T OF DEF.].

4. *Detention in Non-International Armed Conflict: The ICRC's Work on Strengthening Legal Protection*, ICRC (Apr. 21, 2015), <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>.

5. Here one refers to the Detainee Review Boards in Afghanistan or the Administrative Review Boards in Guantanamo, amongst others.

6. U.S. DEP’T OF DEF., *supra* note 3.

7. *Id.*

8. See Exec. Order No. 13780, 3 Fed. Reg. 13209 (Mar. 6, 2017).

Afghanistan or Iraq,⁹ and *habeas* can require many years of litigation including appeals, PRBs should be seen as a necessary parallel track for law-of-war detainees who may not be subject to any criminal proceedings.¹⁰

Most detainees at Guantanamo were picked up during the conflict in Afghanistan,¹¹ but the applicable law remains less than clear. Periodic reviews are set out under the law of international armed conflict (IAC), but they are not explicitly mentioned in the (sparse) treaty law governing NIAC.¹² An IAC exists wherever there is a resort to force between two or more states, and an NIAC exists where there is “protracted armed violence between governmental authorities and organized armed groups or between such groups”¹³ While not without controversy, the United States considers that all persons held in Guantanamo are held in relation to an NIAC.¹⁴

The distinction between IAC and NIAC is key because while detained persons in an IAC have a specific legal status with detailed legal protections, NIAC rules do not create any kind of special legal status for detainees and are generally vague or silent on procedural guarantees.¹⁵ The need for detention during armed conflict is generally not debated, as detention is viewed as a preferable option than to killing the enemy, especially if there is no manifest military necessity to do so.¹⁶ Nonetheless,

9. See *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

10. *Guantanamo Bay Periodic Review Board (PRB) Project: Administrative Detention Rights & Interests of Detainees without Being Charged*, THE GITMO OBSERVER, <https://gitmoobserver.com/prbs/> (last visited Jan. 29, 2018).

11. Jackie Northam, *Q&A About Guantanamo Bay and the Detainees*, NPR (June 23, 2005, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=4715916>. A significant minority were “rendered” from other countries and held elsewhere before arriving in Guantanamo. See generally S. Rep. No. 113–288, at 187 (2014).

12. See *Fact Sheet: New Actions on Guantanamo and Detainee Policy*, THE WHITE HOUSE (Mar. 7, 2011), https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2011/03/Fact_Sheet_-_Guantanamo_and_Detainee_Policy.pdf [hereinafter WHITE HOUSE, *Fact Sheet*].

13. See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 2, August 12, 1949, 6 U.S.T., 75 U.N.T.S. 287 (it applies to any armed conflict, whether it is international or non-international) [hereinafter GC IV]; *Prosecutor v. Tadić*, Case No. IT-940101, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

14. Chris Jenks, *A Matter of Policy: United States Application of the Law of Armed Conflict*, 46 SW. L. REV. 337, 337–39 (2017).

15. *Id.* at 337, 342, 348.

16. See Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 No. 3 EUR. J. INT’L L. 819, 819 (2013).

any deprivation of liberty is a serious affront to personal liberties and must be carefully regulated.¹⁷

There are several factors that make initial detention quite chaotic on a battlefield—particularly in NIAC and especially when the conflict takes place outside of the territories of one of the parties.¹⁸ If it is an extraterritorial NIAC, one can imagine there will be language and cultural barriers present that make it very difficult for the capturing soldier to identify the status or intent of the captured person.¹⁹ In many contexts, one or more of the parties will not be in a uniform and thus in the heat of battle, it will be next to impossible for the capturing soldiers to know whether they have captured a civilian who just happened to be holding a gun for self-defense, a civilian who was directly participating in hostilities, or a member of an organized armed group.²⁰ A capturing soldier may simply be unable to make such determinations. These differences all significantly impact the legality and duration of an individual's detention.²¹

States agreed to detention review mechanisms particularly because of the difficulties of battlefield detention.²² The emphasis was put on initial reviews, as these were intended to help with the status identification of persons in an IAC (i.e. civilians v. combatants), but states also recognized the need for periodic reviews, at least for civilians, to protect against abuses.²³ However, states were far less eager to accept such limitations of NIACs and to have the international community involved in sovereign internal affairs—even though the need for detention and detention reviews

17. Ryan Goodman, *Authorization versus Regulation of Detention in Non-International Armed Conflicts*, 91 INT'L L. STUD. 155, 159 (2015) [hereinafter *Authorization vs. Regulation*].

18. Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV. RED CROSS, 737, 749 (2005).

19. *Id.* at 746, 749.

20. *See, e.g., id.* at 737, 749.

While the dividing line between combatant and civilian might not always be one hundred percent clear in international armed conflicts, it is a distinction that can be maintained at most times. Not so is the situation in non-international armed conflicts, in which this distinction is not as readily visible, neither on the ground nor in the law. *Id.* at 749.

21. *Id.* at 753–54.

22. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 316, 75 U.N.T.S. 135, construed in Jean S. Pictet, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War*, 73 (1960) [hereinafter Pictet, *Commentary III*].

23. *See, e.g., id.* art. 5, 77.

are similar to an IAC.²⁴ In fact, this need in NIAC is probably far greater because there is no “status” in NIACs and thus the military necessity to detain becomes solely about conduct and whether an individual poses a threat.²⁵

Some basic legal requirements should prevent NIAC detention from becoming arbitrary in nature. This should include:

- i) the right to challenge one’s detention before a court, at least on an initial basis (i.e. habeas corpus),
- ii) obligatory, automatic and periodic reviews,
- iii) by an independent and impartial board with the final say in continued detention or release.²⁶

Much of the debate on detention during NIAC centers on whether such detention is even authorized by IHL and/or international human rights law (IHRL). Regardless of the legality of NIAC detention, it takes place in numerous contexts around the world. In light of the reality—if not the legality—of NIAC detention, it is essential to determine if and to what extent these detainees may challenge their detention, and if so, when and how they may do so.²⁷

24. Anna Nelson, *Contemporary IHL Challenges: Use of Force and Non-Intentional Armed Conflicts*, INTERCROSS BLOG (Jan. 2, 2014), <http://intercrossblog.icrc.org/blog/contemporary-ihlchallenges-use-of-force-and-non-international-armed-conflicts>.

25. Unfortunately, as Professor Laurie Blank has stated, “[n]either conventional nor customary law relating to armed conflicts includes any statement regarding the procedural requirements for detention in non-international armed conflict, particularly administrative detention akin to that contemplated in the Fourth Geneva Convention and Additional Protocol I.” See Laurie R. Blank, *Complex Legal Frameworks and Complex Operational Challenges: Navigating the Applicable Law Across the Continuum of Military Operations*, 26 EMORY INT’L L. REV. 87, 104 (2012).

26. Most scholars would also argue that effective assistance of counsel is also necessary to prevent arbitrary detention during armed conflict, but this is beyond the scope of this paper. See *Internment in Armed Conflict: Basic Rules and Challenges*, ICRC, 3, 5, 9 (Nov. 25, 2014), <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges> [hereinafter ICRC, *Internment in Armed Conflict*].

27. For those situations which actually amount to armed conflict and thus are governed at least in part by IHL, there are extensive academic and political debates about the appropriate legal framework and legal classification of detained persons. See, e.g., James Schoettler, *Detention of Combatants and the Global War on Terror*, in 67 THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 131 (Geoffrey S. Corn et al. eds., 2d ed., 2015); Gregory Rose, *Preventive Detention of Individuals Engaged in Transnational Hostilities: Do We Need a Fourth Protocol Additional to the 1949 Geneva Conventions?*, NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE 45–63 (William C. Banks ed., 2011); Peter Vedel Kessing, *Security Detention in UN Peace Operations*, in SEARCHING FOR A “PRINCIPLE OF HUMANITY” IN INTERNATIONAL HUMANITARIAN LAW 272–303 (Cambridge Univ. Press 2012); Tatyana Eatwell, *Selling the Pass:*

The central argument of this article relies on the fact that detention will take place during armed conflict, regardless of whether such detention is “lawful” or not, and thus it is better to regulate such detention than to pretend that it does not happen. This article is not meant to advocate for, or justify the use of, security detention where it is not otherwise permissible, but rather focuses on the ways in which detainees may challenge their detention, regardless of its legality.²⁸ When parties to NIAC detain someone, the procedural guarantees should be clear and established in accordance with international (and/or domestic) law. IHL requires that persons be released as soon as the reasons necessitating their detention no longer exist, but this can only be done if appropriate detention review procedures are put in place.²⁹ The questions this article seeks to address is whether periodic reviews of detention in a NIAC are required, whether Periodic Review Boards meet the minimum legal requirements under international law, and whether they should be perpetuated by this United States administration.

Part II covers the existing international legal rules regarding periodic review of security detention in relation to armed conflict, looking at the law

Habeas Corpus, Diplomatic Relations and the Protection of Liberty and Security of Persons Detained Abroad, 62 INT’L & COMP. L.Q. 727, 727–39 (2013); Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT’L L. 124, 124–77 (2013); Goodman, *supra* note 16, at 819–53; Diane Webber, *Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?*, 6 J. NAT’L SEC. L. & POL’Y 167, 167–205 (2012); Lawrence Hill-Cawthorne, *The Role of Necessity in International Humanitarian and Human Rights Law*, 47 ISR. L. REV. 225 (2014); Deborah N. Pearlstein, *How Wartime Detention Ends*, 36 CARDOZO L. REV. 625, 625–65 (2014); Ashley E. Siegel, *Some Holds Barred: Extending Executive Detention Habeas Law Beyond Guantanamo Bay*, 92 BOS. UNIV. L. REV. 1405, 1405–30 (2012); Laurie R. Blank, *Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1169–93 (2011); Knut Dörmann, *Detention in Non-International Armed Conflicts*, 88 INT’L L. STUD. 347, 347–66 (2012); William K. Lietzau, *Detention of Terrorists in the Twenty-First Century*, 88 INT’L L. STUD. 323, 323–45 (2012).

28. In other words, this paper is setting aside the fact that parties may engage in security detention operations without an appropriate international or domestic legal basis or have chosen to base detention on a LOAC framework when it would be more appropriate to use a criminal law framework. Instead, this paper focuses solely on the procedural guarantees that should be in place when detention is carried out in relation to an (alleged) armed conflict, without taking a position on the validity of that detention as such.

29. Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 132, Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, construed in Jean S. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 510 (1958) [hereinafter Pictet, *Commentary IV*]; see International Committee of the Red Cross [ICRC], *Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts*, Part V, § II, art. 85(4)(b) (1977) [hereinafter *ICRC Protocol*]; International Committee of the Red Cross [ICRC], *Customary International Humanitarian Law Study*, Part V, ch. 37, Rule 128. [hereinafter *ICRC CIHL Study*].

of armed conflict, international humanitarian law and international human rights law. Part III analyzes existing United States law and policy with respect to periodic reviews of security detention in relation to armed conflict. Part IV addresses the structure and appropriateness of PRBs for current and future Guantanamo detainees. Finally, Part V considers how PRBs comport with IHL and makes recommendations regarding the existing PRB process and any security detention review processes that the United States may consider establishing for future non-international armed conflicts in which it may become involved.

II. EXISTING INTERNATIONAL AND DOMESTIC LAW ON PERIODIC REVIEW OF SECURITY DETENTION IN ARMED CONFLICT

This part sets out the legal provisions and the practical reasons for the existence of periodic reviews of detention in relation to armed conflict, during both IACs and NIACs. During IACs civilian internees and certain combatants (e.g. wounded and sick) may be entitled to periodic reviews of detention, but the lack of black letter law in NIACs requires reliance on either customary IHL—which is unclear on the matter—or IHRL—which seems to have certain requirements that may be impossible during battlefield detention and which does not provide for automatic periodic reviews.³⁰ The purpose of Part II is to show the current state of international law—both treaty and customary—and identify where the gaps exists with respect to detention reviews in NIAC.

A. *Periodic Reviews of Internment in International Armed Conflicts*

IHL and IHRL both provide a right to challenge one's detention, and there are very particular reasons why all detainees in any armed conflict should have a mechanism to challenge their detention during an armed conflict.³¹

1. Status in IACs

In order to understand the different review mechanisms in IAC, it is necessary to understand the different status categories found under IHL. The four Geneva Conventions of 1949 established two main categories of persons or “statuses”: combatants and civilians—neither term was

30. See, e.g., *ICRC CIHL Study*, *supra* note 29, at Part V, ch. 32, Rule 99.

31. See *ICRC Protocol*, *supra* note 29, at § I, art. 73(3).

defined.³² However, captured combatants were referred to as “prisoners of war” (POW) and this term was clearly defined.³³ Under Article 4 (1) of the Third Geneva Convention of 1949, “prisoners of war” are defined as “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces”³⁴ The term “civilians” was not defined until the adoption of the 1977 Additional Protocol I (AP I), where it was simply defined in the negative—i.e. everyone who is not a combatant (or another defined status) is a civilian.³⁵ The definition of combatants and civilians is largely uncontroversial, except in the United States, which generally accepts these two categories, but has defended a third status (in both IACs and NIACs) called an unprivileged enemy belligerent.³⁶

There is one provision that applies to all people detained in an IAC regardless of whether an individual meets the criteria of to be protected under one of the Geneva Conventions or AP I (a “protected person”) and thus entitled to a full panoply of protections—Article 75(3) requires that:

32. GC IV, *supra* note 13, at art. 4(1); *see also ICRC Protocol, supra* note 29, at § II, art. 43, 50.

33. *ICRC Protocol, supra* note 29, at § II, art. 44.

34. GC III, *supra* note 29, at art. 4(1). There are also certain categories of “non-combatants” who accompany the armed forces and thus may be entitled to prisoner of war status under Article 4 of GC III. *Id.* at art. 4(2)–(6). In 1977, Additional Protocol I (AP I) expanded the definition of combatant to include individuals who carry weapons openly “a) during each military engagement” and “b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.” *ICRC Protocol, supra* note 29, at § III, art. 44(3).

35. The exact wording of Article 50 of AP I states that a “civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” *ICRC Protocol, supra* note 29, at art. 50(1).

36. The term “unlawful enemy combatant” has also been used. The term “unprivileged enemy belligerent” has been defined in a variety of materials, including in § 948a (7) of the 2009 Military Commissions Act, where the term was defined as an individual who “(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.” 10 U.S.C. § 948(a)(7) (2009).

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.³⁷

AP I does not reference detention review boards, but confirms the already existing rules of the four Geneva Conventions.³⁸ While not all states are a party to AP I, Article 75 is considered customary IHL binding on all parties during an IAC.³⁹

2. Initial Review Mechanisms in IACs

While an IAC presumes that most fighters will be members of a state's armed forces—fully recognizable by their uniforms and other indicators such as ID tags—Article 5 of Geneva Convention III (GC III) explicitly provides a review mechanism for any person who has “committed a belligerent act” but where doubt remains as to whether the person is entitled to POW status.⁴⁰ While there is a presumption of POW status in such IAC cases, if there is a doubt as to the person's status, they must “enjoy the protection of the [Third] Convention until such time as their status has been determined by a competent tribunal.”⁴¹

While some states did not accept the proposal for a court during the drafting negotiations, the term “competent tribunal” was used in Article 5 to prevent a single person from being the sole arbiter for determining an

37. *ICRC Protocol*, *supra* note 29, at § IV, art. 75(3).

38. *Id.* at § III, art. 75.

39. President Obama, for example, declared this article to be binding on the United States as customary international law. WHITE HOUSE, *Fact Sheet*, *supra* note 12. As a reminder, customary law is formed when there is created by looking at state practice and *opinion juris* (i.e. a sense of legal obligation). André da Rocha Ferreira et. al., *Formation and Evidence of Customary International Law*, UFRGSMUN | UFRGS MODEL U.N. J. 182, 183 (2013).

40. GC III, *supra* note 29, at art. 5.

41. Pictet, *Commentary III*, *supra* note 22, at art. 5, 77. This would appear quite straightforward, but in fact, the notion of what constitutes a “competent tribunal” for initial review was a matter of great debate at the diplomatic conference for drafting the Geneva Conventions. According to Jean Pictet, who was present during the drafting and negotiation of the 1949 Conventions, there was some debate over whether the term “responsible authority” or “military tribunal” would be more appropriate. Some at the diplomatic conference thought that such a serious decision should “not be left to a single person” but should be decided by a court. *Id.*

individual's status.⁴² States have implemented this provision in a number of ways, but general practice suggests that an Article 5 Tribunal consists of a certain number of commissioned officers (typically three to five), which may include a military lawyer or judge.⁴³ The initial review carried out in cases of doubt by an Article 5 Tribunal is particularly significant as POWs are also not entitled to periodic reviews of their detention, although they must "be released and repatriated without delay after the cessation of active hostilities."⁴⁴

Unlike combatants, civilians may only be interned in an IAC "if the security of the Detaining Power makes it absolutely necessary"⁴⁵ and are provided an opportunity to challenge the necessity of any deprivation before a court or an administrative board.⁴⁶ Article 43 of the Fourth Geneva Convention (GC IV) states that, "[a]ny protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose."⁴⁷ The International Committee of the Red Cross (ICRC) Commentaries to GC IV emphasize that the main protection for civilian internees is that they "should be absolutely free to make their appeals and that the authorities should examine them with absolute objectivity and impartiality."⁴⁸

42. *Id.* at art. 5, par. 2.

43. David Turns et. al., *Classification, Administration, and Treatment of Battlefield Detainees*, in COUNTERTERRORISM: INTERNATIONAL LAW AND PRACTICE 426, 448–51 (Ana Maria Salinas de Frias et. al. eds., 2012). For more information on state practice in this area, *see generally id.*

44. GC III, *supra* note 29, at art. 118. In addition to the Article 5 tribunals, GC III provides for Mixed Medical Commissions (MMCs) to determine whether wounded or sick POWs must be repatriated or held in a neutral country for health reasons. *Id.* at art.112. The types of wounded and sick POWs that qualify are listed in Article 110 of GC III, but generally those that must be repatriated are those with the most serious cases of mental or physical suffering, and those who may be accommodated in a neutral country are those whose condition requires accommodation outside of the context of captivity to ensure a "more certain and speedy recovery." *Id.* at art.110. Article 112 sets out the requirement for an MMC to review these cases, but the composition and procedures are laid out in far greater detail in Annex II to GC III. Art. 1 of Annex II requires that the "Mixed Medical Commissions provided for in Article 112 of the Convention shall be composed of three members, two of whom shall belong to a neutral country, the third being appointed by the Detaining Power." *Id.* at Annex II, art. 1. Article 6 of Annex II recommends that the two neutral members be medical professionals, namely a surgeon and a general practitioner. *Id.* at Annex II, art. 6. In addition to the composition of MMCs, the regulations are clear that these bodies must be set up immediately "upon the outbreak of hostilities." GC III, *supra* note 29, at art. 112. This is to ensure that they are functioning before the wounded and sick begin to arrive to POW camps or hospitals. *Id.*

45. GC IV, *supra* note 13, at art. 42.

46. *Id.*

47. *Id.* at art. 43.

48. Pictet, *Commentary IV*, *supra* note 29, at art. 43.

Like Article 5 tribunals for POWs, the initial review for civilians interned in an IAC is not automatic.⁴⁹ As with Article 5 tribunals, the state may choose whether to permit access to either a regular court or an administrative board, which must offer “the necessary guarantees of independence and impartiality” and be comprised of more than one official.⁵⁰ If a civilian internee challenges their internment, “the court or administrative board must examine it at the earliest possible moment.”⁵¹ However, there is no further mention of procedure in Article 43 of GC IV with respect to how the initial review should be conducted, and thus the composition and procedures are largely left to states to determine.⁵² Civilians may also be interned in occupied territory⁵³ under procedures essentially identical to Article 43 of GC IV.⁵⁴

3. Periodic Review Mechanisms in IACs

Since POWs are not entitled to any kind of periodic review under IHL, periodic reviews only exist for civilian internees under GC IV.⁵⁵ Both Article 43 of GC IV and Article 78 of GC IV require periodic reviews of internment, which are automatic “appeals” of the initial determination of internment.⁵⁶ While the civilian internee must proactively seek the initial review, he or she is entitled to automatic, regular reviews if the initial challenge failed.⁵⁷ Periodic reviews are, thus, only available to civilian internees that have initially challenged their detention.⁵⁸

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Convention Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 187 CTS 227; Tristan Ferraro, *Determining the Beginning and End of an Occupation Under International Humanitarian Law*, 94 INT’L REV. RED CROSS 133, 133–34 (2012).

54. Article 78 of the GC IV refers to a “regular procedure” that must be “in accordance with the provisions of the present Convention.” GC IV, *supra* note 13, at art. 78.

55. The Mixed Medical Commissions are supposed to visit the POW camps periodically, generally every six months, but it is not clear whether they are required to review only new cases or to also re-examine old cases. Pictet, *Commentary III*, *supra* note 22, at art. 112, 527; *see also* ICRC, *Internment in Armed Conflict*, *supra* note 26 at 5.

56. GC IV, *supra* note 13, at art. 43, 78.

57. Pictet, *Commentary IV*, *supra* note 29, at art. 43.

58. The initial review could in theory be made by the same administrative board, or by a judicial body, depending on the setup of the domestic system. *Id.*

Under Article 43, an administrative board should reconsider cases “at least twice yearly” due to the rapid “progress of events” likely to occur during wartime.⁵⁹ In theory this could be the same board that made the initial decision to intern. The provision adds that the Board should look “favorably” at the appeal but does not give any information on a particular burden of proof or other indication of how the review should be conducted.⁶⁰ Furthermore, the Pictet Commentary only suggests that it would be an “advantage . . . if States Party to the Convention afford better safeguards (examination of cases at more frequent intervals, or the setting up of a higher appeal court).”⁶¹

The provision for periodic reviews under Article 78 of GC IV is essentially the same, except that instead of requiring a review “at least twice yearly”, it only requires review “if possible every six months.”⁶² This seems to suggest that states wanted to give themselves a bit more flexibility in occupied territories, so that even if periodic reviews are still mandatory, their frequency is flexible enough to take into account the exigencies of governing what may be hostile territory. The drafters clearly recognized the obvious difference between setting up detainee reviews in a state’s own territory and setting up detainee reviews when occupying a foreign territory.⁶³ Rule 99 of the ICRC’s Customary International Humanitarian Law Study (CIHL) reaffirms compulsory periodic reviews of detention for civilian internees in an IAC, but does not add further detail to the text and commentaries of Articles 43 and 78.⁶⁴

In summary, initial reviews are available to all types of detainees held in relation to an IAC, but only civilian internees enjoy periodic reviews.⁶⁵ The importance of this distinction is most apparent when discussing periodic reviews in NIAC and considering what types of review mechanisms should be available to those detainees, when compared to an IAC. In other words, should NIAC detainees only be permitted to make an initial *habeas* challenge, akin to the initial Article 5 challenge of a POW, or should they be entitled to periodic review of their detention as civilians in the model of GC IV?

59. *Id.*

60. *Id.*

61. *Id.*

62. Pictet, *Commentary IV*, *supra* note 29, at art. 78.

63. ICRC REP. 27-10-1998, GENERAL PROBLEMS IN IMPLEMENTING THE FOURTH GENEVA CONVENTION, at 1(a) (1998) [hereinafter ICRC, *Geneva*].

64. ICRC Customary IHL (CIHL), *Rule 99. Arbitrary Deprivation of Liberty is Prohibited-International Armed Conflicts, Procedural Requirements*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/vi_rul_rule99 (last visited Feb. 3, 2018) [hereinafter ICRC, *CIHL*].

65. ICRC, *Geneva*, *supra* note 63, at 6(a).

4. Independence and Impartiality

In addition to mandating the availability of detention review boards in IAC, GC IV also makes it clear that these boards must be independent and impartial, but the treaty does not go any further in defining these principles in the context of an armed conflict.⁶⁶ The concepts of independence and impartiality have been thoroughly addressed in relation to fair trial rights under a human rights framework, but less so in the context of administrative processes, and hardly at all in relation to administrative processes under IHL. While all regional human rights treaties mandate that that courts must be both impartial and independent, the exact meaning of these terms is not defined.⁶⁷ Thus, it is necessary to look at various interpretations of these treaties, such as United Nation soft law or international jurisprudence, to have a better understanding of how these terms may be applied by the judiciary.

The International Covenant on Civil and Political Rights (ICCPR) provides in article 14(1) that “all persons shall be equal before the courts and tribunals” and that “in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁶⁸ What exactly is meant by “independence” and “impartiality” and can these concepts be faithfully applied in a battlefield setting?

The principle of judicial independence is an objective concept, and thus is based on objective criteria.⁶⁹ While there is much domestic case law on this issue, in light of the thesis’s focus on international law, it is best to begin with the United Nation’s *Basic Principles on the Independence of the Judiciary*.⁷⁰ The Basic Principles set out a number of different important elements, but there a few key principles that will be of the most use in

66. ICRC, *CIHL*, *supra* note 64.

67. *Id.*

68. International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* on Mar. 23, 1976) [hereinafter ICCPR]. The United States ratified the treaty Sept. 8, 1992. *Id.* Other regional human rights treaties provide a similar rule. *See also*, International Covenant on Civil and Political Rights, art. 14(1), 2200A (XXI), Dec. 16, 1966, O.H.C.H.R. (*entered into force* on Mar. 23, 1976); *see also*, African Charter on Human and Peoples’ Rights, art. 7(1), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (*entered into force* on Oct. 21, 1986); American Convention on Human Rights, art. 8(1) July 18, 1978, 1144 U.N.T.S. 123.

69. *See* Basic Principles of Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 Aug. to 6 Sep. 1985, U.N. Doc.A/Conf.121/22/Rev.1, 60. [hereinafter Basic Principles].

70. *Id.* at 59.

discussing independence as applied to periodic review boards during NIACs.⁷¹

Basic Principle 1 states “[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country . . . [i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”⁷² Basic Principle 3 states “[t]he judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”⁷³ Basic Principle 4 prohibits “inappropriate or unwarranted interference with the judicial process[.]”⁷⁴ Finally, Basic Principles 10, 11, and 12 work together to ensure that judges have “appropriate training or qualifications in law”, and are adequately remunerated and given terms and tenure “secured by law.”⁷⁵

As demonstrated by the Basic Principles, the principle of independence is more about structure or “institutional design” and reflects objective criteria such as “financial and job security.”⁷⁶ As noted in Basic Principles 10 to 12, the other side of independence is the requirement that judges possess “a solid understanding of the law, as well as experience with the task of adjudication.”⁷⁷ The Canadian Supreme Court has described judicial independence as based on the relationship between institutions (i.e. the executive and judiciary) and individuals (i.e. between the judge and executive).⁷⁸

While financial and job security are some of the aspects to independence, the independence of judicial decision making is one necessary aspect worth highlighting, as it is essential to discussing the independence of review boards in later sections. This concept is briefly mentioned in Basic Principle 1, which refers to the need for other government institutions to respect the independence of the judiciary.⁷⁹ The underlying concept is that “the Executive, the Legislature, as well as other authorities, such as the police, prison, social and educational authorities,

71. *Id.* at 60.

72. *Id.*

73. *Id.*

74. Basic Principles, *supra* note 69, at 60.

75. *Id.* at 61.

76. Diane M. Amann, *Punish or Surveil*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 873, 900 (2007).

77. *Id.* at 901.

78. *Valente v. The Queen* [1985] S.C.R. 673 (Can.).

79. Basic Principles, *supra* note 69, at 60.

must respect and abide by the judgements and decisions of the Judiciary, even when they do not agree with them.”⁸⁰ The right of the judiciary to make a binding decision that other governmental authorities must respect will be referred to in this article as “the right to order release”.⁸¹

On the other hand, the principle of judicial *impartiality* is generally viewed as a more subjective concept under international law, although there are objective elements.⁸² Basic Principle 2 mandates that a judge must be free to “decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”⁸³

The Human Rights Committee (HRC) has opined on the nature of impartiality at least with respect to the meaning of Article 14(1) of the ICCPR.⁸⁴ The HRC stated in *Arvo O. Karttunen v. Finland* that impartiality “implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.”⁸⁵ Likewise in the *Valente* case, the Canadian Supreme Court referred to impartiality as “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.”⁸⁶

Of immediate relevance to this discussion of the PRBs is the African Commission on Human and Peoples’ Rights decision in the *Constitutional Rights Project*, where it found a violation of article 7(1)(d) of the Charter merely because there were military personnel sitting along with a judge on Nigeria’s Special Tribunal.⁸⁷ The Commission found that the composition of the Special Tribunal “alone create[d] the appearance, if not actual lack, of impartiality.”⁸⁸ The composition of a judicial body could represent one of the more objective indicators of impartiality, even if the judges/decision-

80. OHCHR & Int’l Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, PROF. TRAINING SERIES No. 9, 1, 121 (2003), <http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf>.

81. *Id.*

82. *Id.* at 120.

83. Basic Principles, *supra* note 69, at 60; Amann, *supra* note 76, at 902.

84. See generally U.N. doc. GAOR, A/48/40 (vol. II) U.N. Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on Oct. 23, 1992).

85. *Id.* at 120.

86. *Valente v. The Queen* [1985] S.C.R. 673 (Can.).

87. *Constitutional Rights Project v. Nigeria*, Comm. No. 87/93, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 5 (1995), <http://www1.umn.edu/humanrts/africa/comcases/87-93.html>.

88. *Id.* at ¶ 14.

makers themselves do not have a personal bias.⁸⁹ The issue of independence and impartiality of the PRBs will be discussed further in Part IV.

5. Prohibition Against Self-incrimination?

The protection against self-incrimination is a well-settled principle of law, including under IHL.⁹⁰ Article 75(4)(f) AP I, which is generally considered to be a rule of customary law,⁹¹ states that “no one shall be compelled to testify against himself or to confess guilt.”⁹² Under United States domestic law, this right is enshrined by the Fifth Amendment, but this right has been held to only apply if such statements are going to be used or are used in criminal proceedings.⁹³ Thus, the application of the Fifth Amendment to a non-criminal, administrative setting like that of the PRB, is far less clear and beyond the scope of this paper to resolve. Nonetheless, it is worth flagging in light of the practical implications it has in a detainee’s determination whether and to what extent to participate in the PRBs. A few suggestions on how to practically remove this issue from the debate are offered in Part IV.

B. *Periodic Reviews of Internment in Non-International Armed Conflicts*

As the black letter law of NIAC does not mention detention review or any right to challenge detention, this section must examine other sources of law including customary IHL on the right to challenge detention and review mechanisms in the context of NIAC.⁹⁴ The vast majority of practice in this area has taken place in the past decade—with the emergence of long-term NIAC detention by western states in places like Afghanistan, Iraq, and

89. See, e.g., *Daktaras v. Lithuania*, App. No. 42095/98, ¶ 31 Eur. Ct. H.R.

90. See, e.g., Practice Relating to Rule 100. Fair Trial Guarantees (Section J. Compelling accused persons to testify against themselves or to confess guilt), Int’l Comm’n H.R., https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule100_sectionj.

91. See, e.g., WHITE HOUSE, *Fact Sheet*, *supra* note 12.

92. *ICRC Protocol*, *supra* note 29, at art. 75(4)(f).

93. The Fifth Amendment provides that “[n]o person shall be compelled . . . in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.” U.S. CONST. AMEND. V. But see *Entzi v. Redmann*, 485 F.3d 998, 1002 (8th Cir. 2007) (“the general rule is that a person has no claim for civil liability based on the Fifth Amendment’s guarantee against compelled self-incrimination unless compelled statements are admitted against him in a criminal case . . .”).

94. Int’l Comm. Red Cross [ICRC], *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict*, 6, 15 (Sept. 22–23, 2008), <https://www.icrc.org/eng/assets/files/other/security-detention-chatham-icrc-report-091209.pdf>.

Guantanamo, as well as the increase in the (usually) short-term detention by international peacekeepers—so, it should not come as a surprise that this custom is not yet clear.⁹⁵ Because customary IHL appears to be undecided with respect to periodic review mechanisms, this section also examines IHRL to determine whether that body of law provides additional rules that could be applied instead of or alongside customary IHL during NIAC. Alternatively, in the absence of any clear rules of customary IHL or IHRL, this paper also addresses whether IAC rules could be applied by analogy.

Rule 99 of the ICRC's CIHL Study provides mandatory initial reviews of detention in NIAC but does not discuss periodic reviews.⁹⁶ There is very little written about the obligation, composition or comportment of detention review boards in NIACs (or in IACs, for that matter). Lawrence Hill-Cawthorne's seminal work on detention rules in NIACs provides a detailed overview of procedural guarantees under both IHL and IHRL.⁹⁷ However, the section on internment reviews—including both initial and periodic reviews—is notably brief, albeit providing a number of helpful observations.⁹⁸ He compares Article 43 and 78 of GC IV, but finds that even in IACs, "procedures to be followed by the review bodies are not prescribed."⁹⁹ He notes that initial reviews must: i) take place as soon as possible after the person is detained, and ii) the reviewing body must be a "board," not a "single person."¹⁰⁰ Otherwise, he finds no particular requirements about the composition of the review board, the right to be represented or call witnesses, or the "standard of review to be applied."¹⁰¹

The ICRC determined that certain procedural safeguards are required in any form of security or administrative detention setting which takes place in armed conflict, based on both the spirit and purpose of IHL and human rights norms.¹⁰² ICRC guidelines on Procedural Safeguards in

95. See generally Miles P. Fischer, *Applicability of the Geneva Conventions to "Armed Conflict" in the War on Terror*, 30 FORDHAM INT'L L.J. 3 (2006); Bruce Oswald, *The Copenhagen Principles, International Military Operations and Detentions*, J. OF INT'L PEACEKEEPING, Vol. 17, 116, 117 (2013), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478519.

96. ICRC, *CIHL*, *supra* note 64.

97. See generally LAWRENCE HILL-CAWTHORNE, *DETENTION IN NON-INTERNATIONAL ARMED CONFLICT* (Oxford University Press 2016).

98. See *id.*

99. *Id.* at 53.

100. *Id.* at 53–54.

101. *Id.*

102. Jelena Pejić, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS, 388–89 (2005).

Internment/Administrative Detention set out the standards applicable for periodic reviews of detention.¹⁰³

The purpose of the periodical review is to ascertain whether the detainee continues to pose a real threat to the security of the detaining power and to order release if that is not the case. All the safeguards that apply to the initial review must apply to the periodical review(s) as well, which, among other things, means that the review has to be effective and must be conducted by an independent and impartial body . . . Internment/administrative detention will in practice be regulated by the domestic law of the State involved in a non-international armed conflict or other situation of violence, meaning that a person's ability to challenge the lawfulness of his or her internment/administrative detention will be regulated by those norms. If the relevant domestic law makes no such provision, it is submitted that at least six-monthly reviews of internment/administrative detention should be provided for, similar to the rules applicable in international armed conflicts.¹⁰⁴

The ICRC's updated Commentary to the First Geneva Convention (GC I) mentions the right to challenge the lawfulness of detention in NIAC before an independent and impartial review board in its revised commentary on Common Article 3.¹⁰⁵ It recognizes that, "the review of lawfulness of internment must be carried out by an independent and impartial body."¹⁰⁶ "Where internment review is administrative rather than judicial in nature, ensuring the requisite independence and impartiality of the review body will require particular attention."¹⁰⁷

While these interpretations are highly regarded and often quoted by the international legal community, they represent ICRC's—not states'—views about procedural safeguards for internment or administrative

103. *Id.* at 388.

104. *Id.* at 388–89.

105. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, construed in ICRC, *Commentary to Common Article 3 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ¶ 722–23 (1960) [hereinafter ICRC, *Commentary of 2016, Article 3*].

106. *Id.* at ¶ 723.

107. *Id.*

The guidelines also provide for the right to periodical review of the lawfulness of continued internment. Periodical review obliges the detaining authority to ascertain whether the detainee continues to pose an imperative threat to security and to order release if that is not the case. The safeguards that apply to initial review are also to be applied at periodical review. *Id.* at ¶ 724.

detention.¹⁰⁸ The ICRC itself admits that the rules are still not as clear as they would like, recognizing that “the question of which standards and safeguards are required in NIAC to prevent arbitrariness is still subject to debate and needs further clarification, in part linked to unresolved issues on the interplay between international humanitarian law and international human rights law.”¹⁰⁹ However, as noted in the 2005 ICRC Procedural Safeguards guidelines:

The reason for outlining the procedural principles and safeguards that govern internment/administrative detention is that although this type of deprivation of liberty is often practised in both international and non-international armed conflicts and other situations of violence, the protection of the rights of the persons affected by it is insufficiently elaborated.¹¹⁰

At the time, the ICRC based the majority of its arguments about basic procedural guarantees in administrative detention on some combination of legal provisions identified in GC IV, Article 75 of AP I, and/or human rights law.¹¹¹ Under the rules of IAC, the ICRC acknowledged that states are given the choice between courts and administrative review boards for the initial detention challenge.¹¹² However, for NIACs, the ICRC asserted that:

[H]uman rights law and jurisprudence applicable to situations of non-international armed conflict or other situations of violence unequivocally require that challenges to the lawfulness of internment/administrative detention be heard by a court. Under the ICCPR, anyone deprived of liberty is entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.¹¹³

The requirement for a judicial hearing would seem to be with respect to the initial right to challenge one’s detention, but some states have not signed up to the applicable human rights treaties or have interpreted their

108. *Id.* at ¶ 725.

109. *Id.*

110. Pejic, *supra* note 102, at 376.

111. *See generally ICRC Protocol, supra* note 29, at art. 75.

112. Pejic, *supra* note 102, at 387.

113. *Id.*

obligations differently.¹¹⁴ However, even if one accepts that judicial review of detention in NIAC is a non-derogable right under IHRL, it does not answer the question of whether periodic reviews are also required.

The ICRC is not alone in trying to establish the necessity of periodic review mechanisms for NIAC detention. Ashley Deeks, a United States expert on the laws of war, argues that the “core procedures contained in the Fourth Geneva Convention are battle-tested and serve as an excellent basis for administrative detention during all types of armed conflict.”¹¹⁵ IHL provides a “near-term ability to challenge that detention before a court or an administrative board (at the choice of the state)” in part because IHL recognizes that mistakes are easy to make on the battlefield.¹¹⁶ In other words, detention in NIAC should “require the state to immediately review that detention, permit the detainee to appeal the initial detention decision, require the state to review the detention periodically, and obligate the state to release the detainee when the reasons for his detention have ceased.”¹¹⁷ However, Deeks recognizes that rules for internment review, even under GC IV, are vague at best.¹¹⁸

Regardless of whether the right to challenge detention before a judicial body is a non-derogable right during peacetime and armed conflict, states have acknowledged the need for periodic, administrative review boards.¹¹⁹ In light of the particular challenges of coalition warfare in extraterritorial NIACs (e.g. Afghanistan and Iraq), twenty-four states came together to create a body of non-binding guidelines for these types of situations—The Copenhagen Process Principles and Guidelines.¹²⁰ In its preamble, it is

114. The District of Columbia Court of Appeals, for example, has said that the *writ of habeas corpus* does not to apply extraterritorially to non-citizens. See *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

115. Ashley Deeks, *Security Detention: The International Legal Framework: Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 405 (2009).

116. *Id.*

117. *Id.* at 408. Deeks also asserts that IHL is more suited to battlefield detention than IHRL in part because it allows for some flexibility in wartime conditions. See *id.* at 408–09.

118. *Id.* at 409–10.

119. Arguments for why periodic reviews are needed even when judicial review is present is made in the next section.

120. The Copenhagen Process on the Handling of Detainees in International Military Operations, ¶ I (Oct. 19, 2012), https://erasmusmais.pt/uploads/files/references/copenhagen_process-590ccac4a79a8.pdf [hereinafter Copenhagen Process]. These twenty-four states are: Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, India, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the United Kingdom, and the United States of America. *Id.* Additionally, the following non-state actors participated: the African Union (AU), the European Union (EU), the North Atlantic Treaty Organization (NATO), the United Nations (UN), and the ICRC. *Id.*

described as “intended to apply to international military operations in the context of non-international armed conflicts and peace operations; they are not intended to address international armed conflicts.”¹²¹ The Copenhagen Guidelines reflect the understanding of many states that NIAC detention in an extraterritorial conflict is not necessarily subject to judicial review, but that detainees should be able to challenge their detention before a competent body.¹²² Principle 12 of the Copenhagen Guidelines states that, “[a] detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorized to determine the lawfulness and appropriateness of continued detention.”¹²³ While the Copenhagen Guidelines do not represent a legal authority, they reflect emerging state practice on the issue.

In conclusion, there is no treaty-based rule, nor does there appear to be a customary rule of IHL on periodic reviews for NIAC detention, although there is some indication that this norm could be slowly emerging based on state practice. The next section looks at whether IHRL, which applies at all times, requires periodic reviews in addition to any initial judicial reviews IHLR would require.

C. *Periodic Reviews of Internment Under International Human Rights Law*

Security or administrative detention in relation to an armed conflict is generally frowned upon under most IHRL regimes, but is not prohibited outright, although it may require derogation, at least from certain regional treaty regimes like the European Court of Human Rights (ECHR).¹²⁴ The starting point for security detention under IHRL comes from the ICCPR and corresponding rulings or opinions by the Human Rights Committee (HRC). According to the HRC:

121. *Id.* at 1.

122. *Id.* at 2.

123. *Id.* at 4.

124. *See id.*

if so-called preventive detention is used, for reasons of public security . . . it must not be arbitrary, and must be based on grounds and procedures established by law . . . information of the reasons must be given . . . and court control of the detention must be available . . . as well as compensation in the case of a breach.¹²⁵

Where security detention is used, however, IHRL requires that detainees be given the opportunity to challenge their detention before a judicial body, and at least the HRC has stipulated that this right is non-derogable.¹²⁶

Claire Macken's often-quoted and comprehensive analysis of preventive detention under the ICCPR provides a useful overview of procedural guarantees for security detention under IHRL and discusses the fundamental right to challenge security detention under the ICCPR.¹²⁷ According to Macken, detainees must have the right to challenge their detention before a competent body, which is normally read to mean the right to *habeas corpus*.¹²⁸ Nonetheless, in looking at the *travaux préparatoires*, it seems "the reference to *habeas corpus* was deleted in order to specify that states must be free to allow for such a right of appeal within the framework of their own legal systems."¹²⁹

While IHRL may not directly provide for periodic administrative review boards, some human rights courts entertain the notion of them in the context of IACs.¹³⁰ The ECHR, for example, accepted that frequent periodic reviews by a "competent body" for civilian internees in IAC could be compatible with Article 5 of the ECHR, so long as the body provides "sufficient guarantees of impartiality and fair procedure to protect against

125. U.N. Human Rights Committee (HRC), *General Comment no. 8*, Art. 9 (16th Sess., 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 8, ¶ 4 (1994).

126. ICCPR, *supra* note 68, at art. 9 (4); U.N. Hum. Rts. Committee (HRC), *General Comment no. 29*, Art. 4, States of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), ¶11.

127. Claire Macken, *Preventative Detention and the Right of Personal Liberty and Security Under the International Covenant on Civil and Political Rights*, 1966, 26 ADELAIDE L. REV. 1, 27 (2005).

128. *Id.* at 24.

129. *Id.* (quoting MARC J. BOSSUYT, GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 213 (1987)).

130. See *id.* at 8–9 (noting that some human rights courts, like the Nato-led Kosovo Force (KFOR), follows the notion of administrative review boards).

arbitrariness.”¹³¹ The United Kingdom Supreme Court has also posited that periodic reviews may be appropriate in certain circumstances where *habeas* is impracticable.¹³²

Therefore, one can conclude that while IHRL may not directly provide for periodic reviews in IACs, it does not exclude them.¹³³ For example, in *Rameka v. New Zealand*, the HRC held that:

While preventive detention for the purpose of protecting the public against dangerous criminals is not prohibited as such under the Covenant and its imposition sometimes cannot be avoided, it must be subject to the strictest procedural safeguards, as provided for in article 9 of the Covenant, including the possibility for periodic review, by a court, of the continuing lawfulness of such detention. Such reviews are necessary as any human person has the potential to change and improve, i.e. to become less dangerous over time (e.g. as a consequence of inner growth or of a successful therapy, or as a result of an ailment reducing his physical abilities to commit a specific category of crimes).¹³⁴

It is even less clear with NIACs as there is no IHL treaty provision on which IHRL bodies can rely, and IHRL does not provide any explicit treaty basis for periodic reviews of the legality of detention, at least in the sense of NIAC detention reviews.¹³⁵ Nonetheless, the HRC “has held that detention which may have initially been legal may become arbitrary if it is unduly prolonged or not subject to periodic review.”¹³⁶ At least some forms of periodic review of administrative detention (e.g. immigration detention) appear to be part of the fundamental guarantees needed to protect against

131. Vaios Koutroulis, *Proceedings of the Bruges Colloquium: Detention in Armed Conflict*, 15th Bruges Colloquium Oct. 16–17, 2014 (quoting *Hassan v. UK*, App No 29750/09, Judgment, 45 (Grand Chamber), Sept. 16, 2014).

132. *See Serdar Mohammed v. Ministry of Defence* (2017) UKSC 2, at 103.

133. “There is no specified periodicity of review available to persons detained in non-international armed conflicts or other situations of violence, because human rights law does not limit the frequency of challenges that may be submitted by an interned/administratively detained person to the lawfulness of detention (*habeas corpus* petitions).” *See Pejic, supra* note 102, at 388–99.

134. *Rameka v. New Zealand*, CCPR/C/79/D/1090/2002 (2003), individual opinion of Committee member Mr. Walter Kälin (dissenting in part).

135. *See ICRC, Internment in Armed Conflict, supra* note 26, at 1, 6.

136. Submission to the U.N. Hum. Rts. Committee (HRC), General comment no. 35, Art. 9 (109th Sess. 14 Oct.–1 Nov. 2013), Liberty and Security of the Person, for the Consideration of the U.N. Human Rights Committee, Geneva, EQUAL RTS TRUST 1, 9 Oct. 2013.

arbitrary detention.¹³⁷ Therefore, HRC jurisprudence would at least seem to accept the necessity of periodic reviews if security detention takes place.

Dissenting in the *Rameka* case, Mr. Kalin considered that “the compulsory annual reviews of detention” by the Parole Board, which were “subject to judicial review in the High Court and Court of Appeal,” may have met the standard of non-arbitrariness with respect to detention since the detention had been subject to “regular periodic reviews of the individual case by an independent body.”¹³⁸ However, with little additional IHRL case law on the subject of periodic reviews, and almost no case law on periodic review for security or NIAC detention, it is difficult to determine how bodies like the HRC would interpret a requirement to have periodic reviews by an administrative, rather than a judicial, body.

Habeas petitions, or their equivalent, are generally available at any time under IHRL, so there is no particular periodicity attached.¹³⁹ However, a typical *habeas* petition is intended to challenge the lawfulness of detention and must be proactively brought by the petitioner.¹⁴⁰ Regular, periodic administrative reviews of detention may serve the same purpose of challenging the lawfulness of detention (or in some systems, the continued “need” for detention even if such detention is *per se* lawful), but they should at least in theory be faster and less burdensome than a full-blown court proceeding, and should be automatic in nature. Furthermore, IHRL does not take into account the battlefield context, where access to *habeas* courts (particularly if the courts sit in a third state) may prove to be logistically impossible or at least far less efficient than an on-site administrative review board.¹⁴¹

Thus, while IHRL may not specifically provide for periodic review boards in NIAC, it does not exclude them and in very narrow circumstances may consider them an appropriate alternative when there is no access to judicial proceedings.¹⁴²

137. Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT’L. REV. RED CROSS 15, 17–18, 29 (2005).

138. *Rameka*, CCPR/C/79/D/1090/2002 ¶ 7.3.

139. Brian Farrell, *Habeas Corpus in International Law* 3 (May 4, 2014) (unpublished Ph.D. dissertation, National University of Ireland, Galway); see *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

140. Farrell, *supra* note 139, at 2, 157; ICRC, CIHL, *supra* note 64; Richard Nicholson, *Functionalism’s Military Necessity Problem: Extraterritorial Habeas Corpus, Justice Kennedy, Boumediene v. Bush, and Al Maqaleh v. Gates*, 81 FORDHAM L. REV. 1393, 1399 (2012).

141. Farrell, *supra* note 139, at 290–91.

142. ICRC, *Internment in Armed Conflict*, *supra* note 26, at 2.

D. *Periodic Reviews of Internment Under United States' Domestic Law*

Since the PRBs were established by executive order, their existence is a matter of policy and can be overturned in an instant, and PRBs are not available to any United States law-of-war detainees outside of Guantanamo, so it is important to examine United States' domestic law on the issue of periodic reviews.¹⁴³ While there is no explicit domestic legislation requiring periodic reviews in relation to any armed conflict or security detention, the Department of Defense Law of War Manual (DoD LOW Manual) sets out a framework for establishing reviews in detention operations carried out by the Department of Defense (DoD).¹⁴⁴

For IACs, DoD clearly follows the provisions of GC IV. According to § 10.9.2.3, civilian internees:

[S]hall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placement in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favorable amendment of the initial decision, if circumstances permit.¹⁴⁵

With respect to persons detained in NIACs or to “unprivileged belligerents,” the DoD LOW Manual reflects its own practice rather than binding legal norms, and permits “unprivileged belligerents” to be detained until the end of hostilities.¹⁴⁶ However, it also notes “DoD practice has been to review periodically the detention of all persons not afforded POW status or treatment.”¹⁴⁷ Section 8.14.2 reflects additional DoD practice for persons detained for “security reasons” but not designated as “unprivileged belligerents.”¹⁴⁸ For these individuals, DoD notes that the practice “is to have, in addition to a prompt initial review, the decision to detain reconsidered periodically by an impartial and objective authority that is

143. See Executive Order No. 13567, 76 Fed. Reg. 13,277 (Mar. 7, 2011) [hereinafter Exec. Order No. 13567].

144. U.S. DEP'T OF DEFENSE, Department of Defense Law of War Manual, ¶ 10.9.2.3 (June 2015) [hereinafter DOD Law of War Manual] (the Manual does not represent binding law, but it reflects the Department of Defense's interpretation of the laws of war).

145. *Id.*

146. *Id.* at ¶ 4.19.3.4.

147. *Id.*

148. *Id.* at ¶ 8.14.2.

authorized to determine the lawfulness and appropriateness of continued detention.”¹⁴⁹ The review board could be either military or civilian in nature.¹⁵⁰

This section also suggests that reviews may not be every six months, but would:

depend on a variety of factors, including: (1) operational necessities or resource constraints, such as force protection, the availability of interpreters, or large numbers of detainees; (2) the thoroughness of the review process; and (3) whether there is a true prospect that the legal or factual predicates justifying detention have changed.¹⁵¹

In keeping with IHL, the DoD LOW Manual accepts that “such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention, or internment have ceased to exist.”¹⁵² However, the DoD LOW Manual also recognizes that “[a]s a matter of policy, release of lawfully detained persons often occurs before the conclusion of hostilities.”¹⁵³

In conclusion, there is no clearly binding rule of international or domestic law providing for periodic reviews of NIAC detention. Nonetheless, it would appear from emerging customary norms, IHRL, and the spirit and purpose of IHL, that detainees held in relation to NIAC must be permitted to challenge their detention periodically in order to prevent it from being, or becoming, arbitrary in nature. The preference will always be that such challenges take place before a court, at least initially. Regardless, periodic reviews should be regularly and automatically provided to prevent detention from becoming arbitrary in nature, since such detainees have not been charged or convicted as part of a criminal proceeding.

III. PERIODIC REVIEWS FOR GUANTANAMO DETAINEES

The United States is by far the greatest promoter of *ad hoc* administrative reviews of security or NIAC detention.¹⁵⁴ The United States has tried, adapted, re-launched, and settled upon numerous variations of

149. DoD Law of War Manual, *supra* note 144, at ¶ 8.14.2.

150. *Id.* at ¶ 8.14.2.

151. *Id.*

152. *Id.* at ¶ 8.14.3.

153. *Id.* at ¶ 8.14.3.1.

154. This article will refer to “security detention” or “NIAC detention” interchangeably. Any use of the term “security detention” refers to administrative detention in relation to an armed conflict and subject to LOAC rules.

these reviews in Guantanamo, Afghanistan, and Iraq.¹⁵⁵ The scope of this article does not permit an in-depth analysis of each past process, but some background is needed to understand the evolution of the detention review processes in the United States.¹⁵⁶

A. *Legal Status of Guantanamo Detainees*

The majority of Guantanamo detainees were captured in relation to the conflict in Afghanistan.¹⁵⁷ However, the classification of that conflict, and therefore the status of the detainees, has never been straightforward. Most IHL scholars consider the conflict in Afghanistan to have been an IAC between the United States and the Taliban from the commencement of active hostilities on October 7, 2001, until the election of Hamid Karzai by the Loya Jirga on June 19, 2002.¹⁵⁸ This means that those Guantanamo detainees captured in that period should have received protected status as either POWs under GC III or as civilian internees under GC IV. Initially, the United States government did not acknowledge the existence of an IAC, and at one point even refused to apply the rules of NIAC.¹⁵⁹ However, the

155. See generally Thomas B. Nachbar, *Executive Branch Policy Meets International Law in the Evolution of the Domestic Law of Detention*, 53 VA. J. INT'L L. 201 (2013).

156. It is also important to note that the United States uses a bifurcated system separating the grounds for detention and the imperative security threat posed by NIAC detainees. Geneva Convention I Wounded and Sick in the Field, Introduction, B(1)(f), Aug. 12, 1949; see also, Eric Talbot Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 CHI. J. INT'L L. 685, 692 (2012). In practice this means that in the United States and in Guantanamo, any initial challenge to the lawfulness of detention is subject to federal habeas review. U.S. DEP'T OF DEF., *About the Periodic Review Board*, PERIODIC REV. SECRETARIAT, <http://www.prs.mil/About-the-PRB/> (last visited Jan. 18, 2018) [hereinafter DOD, *About the Periodic Review Board*]. The initial grounds for detention is confirmed by a federal civilian court when challenged by a detainee, whereas the security threat and necessity of continued detention is examined by an administrative board. Cong. Research Serv., R40139, 3, 12 (2011). In all other contexts, such as Iraq and Afghanistan, the legal and threat bifurcation remains in theory, but detainees are not entitled to habeas challenges, and thus may only challenge the need for continued detention by demonstrating to an administrative board that they do not (or no longer) pose a threat to security. David G. Savage & Christi Parsons, *Court: No habeas Rights for Prisoners in Afghanistan*, LOS ANGELES TIMES (May 21, 2010), <http://articles.latimes.com/print/2010/may/21/nation/la-na-court-bagram-20100522>.

157. Joy Olson, WASH. OFFICE ON LATIN AM., *Guantanamo Fact Sheet*, Background, ¶ 6 (Dec. 5, 2014), <https://www.wola.org/sites/default/files/downloadable/WOLA%20General/Guantanamo%20Fact%20Sheet.pdf>.

158. See, e.g., Robin Geiss & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 INT'L REV. RED CROSS, 11 (2011).

159. See, e.g., *Application of Treaties and Laws to Al Qaeda and Taliban Detainees*, (Jan. 22, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees>.

United States' Supreme Court in *Hamdan v. Rumsfeld* held the conflict in which Guantanamo detainees had been captured was at the very least a NIAC governed by Common Article 3.¹⁶⁰ Since NIACs provide no clear status or special protections, unlike those found for POWs, detainees in Guantanamo are left with very little black letter law on which to rely.¹⁶¹ To add to the uncertainty, the United States has treated individuals captured in Afghanistan and transferred to Guantanamo as unprivileged enemy belligerents, a status not found in IHL or elsewhere in international law, but which seems to have crystallized in United States domestic law.¹⁶²

The detention facility at Guantanamo is truly *sui generis*, both factually and legally, so both the conditions of detention and the legal abyss in which it exists are unlikely to be reproduced, and thus the rules or policies that arise out of it are almost impossible to apply in a more "normal" battlefield context. However, the United States authorities have experimented with different kinds of security review processes, including Combatant Status Review Tribunals (CSRTs) and Administrative Review

pdf; see also, Miles P. Fischer, *Applicability of the Geneva Conventions to "Armed Conflict" in the War on Terror*, 30 FORDHAM INT'L L.J. 509, 512 (2006).

160. *Hamdan v. Rumsfeld*, 548 U.S. 557, 563 (2006).

161. While the text of the 2001 AUMF does reference persons participating in the 9/11 attacks against the United States, the majority of later *habeas* cases do not reflect any direct connection between those held in Guantanamo as NIAC detainees and persons who would meet the narrow criteria of persons involved, even tangentially, in the attacks on the World Trade Center. See Hathaway et al., *supra* note 27, at 123, 125, 129, 130–31 (2013). This excludes the handful of Guantanamo detainees specifically charged in relation to these attacks of course. *Id.* at 130. Later legislation, such as the Military Commissions Act or the National Defense Authorization Act (NDAA) for FY2012 provided some post-hoc guidance on status of persons in Guantanamo, but the vast majority of Guantanamo detainees had already arrived by 2006 (and certainly by 2012), meaning the 2001 AUMF was the sole legal basis for detaining these individuals. Cong. Research Serv., R42143, 3 (2016). As the 2006 (and later 2009) Military Commissions Act only governs prosecution for war crimes and thus affects only a small number of detainees held, it is reasonable to argue that there was no significant clarification of status between the 2001 AUMF and the 2012 NDAA when Congress finally defined persons who could be detained under the 2001 AUMF. See National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (2011).

162. Many articles have been written on unprivileged enemy belligerents (also known as unlawful enemy combatants) so this paper will not dwell on this issue except to flag the terminology. For sources supporting the notion of an "unprivileged [enemy] belligerent." See, e.g., Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, in HUMANITARIAN POLICY AND CONFLICT RESEARCH OCCASIONAL PAPER SERIES 45–67 (2005); see generally Scott Reid, *Terrorists as Enemy Combatants: An Analysis of How the United States Applies the Law of Armed Conflict in the Global War on Terrorism* (Feb. 9, 2004) (unpublished manuscript) (Naval War College). But see, Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants"*, 85 INT'L REV. RED CROSS 45 (2003); Laura M. Olson, *Guantanamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards*, 42 CASE W. RES. REV. J. INT'L L. 197, 214 (2009).

Boards (ARBs).¹⁶³ There were a number of major shortcomings with these processes, including the fact that detainees barely had any time to prepare a defense, did not have access to private counsel, and that the final decision to order release or transfer was not made by the Board itself.¹⁶⁴

Both the CSRTs and ARBs were highly criticized and were discontinued around 2007 as new arrivals ceased.¹⁶⁵ Newly elected President Obama ordered his own review of the status of detainees in Guantanamo, which was known as the Guantanamo Review Task Force.¹⁶⁶ It published its findings in January 2010, but as with the previous reviews, it was without the formal participation of detainees, and thus did not provide the kind of review process foreseen by international law.¹⁶⁷

B. *Executive Order 13567 and the Progression of PRBs from 2013-2016*

When it became clear that the Guantanamo Bay Detention Facility was not going to close as promptly as planned and that *habeas* was not proving to be a very expedient way for detainees to challenge their continued detention, new procedures and policies were put in place to allow detainees an additional means of challenging their continued detention.¹⁶⁸ The PRBs were established by Executive Order 13567 (EO 13567) on March 7, 2011.¹⁶⁹ The “Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567,” which set out the specific procedures for these reviews, were not promulgated until May 9, 2012.¹⁷⁰ The first PRB hearing did not take place until November 2013,¹⁷¹

163. *Boumediene v. Bush*, 553 U.S. 723, 767, 785–86 (2008).

164. Thomas R. Johnson, *Combatant Status Review Tribunals: An Ordeal Through the Eyes of One “Enemy Combatant”*, 11 LEWIS & CLARK L. REV. 943, 947–50 (2007); see generally Brian J. Foley, *Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY, 1009 (2007).

165. *Boumediene*, 553 U.S. at 767, 785–86 (2008).

166. See U.S. DEP’T OF JUSTICE, U.S. DEP’T OF DEF., U.S. DEP’T OF STATE, U.S. DEP’T OF HOMELAND SEC., OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, & JOINT CHIEFS OF STAFF, *Final Report: Guantanamo Review Task Force* (2010).

167. *Id.*

168. See generally Benjamin Wittes et. al., *The Emerging Law of Detention 2.0 The Guantánamo Habeas Cases as Lawmaking*, HARV. L. SCH. NAT’L SEC. RESEARCH COMM., (Apr. 2012), <https://www.brookings.edu/wp-content/uploads/2016/06/Chesney-Full-Text-Update32913.pdf> (for more information on the difficulties that *habeas* cases have run into with respect to Guantanamo detainees, and the ways in which they can challenge their detentions).

169. Exec. Order No. 13567, *supra* note 143, at 1377.

170. OFFICE OF THE SEC’Y OF DEF., U.S. DEP’T OF DEF., MEMORANDUM FOR CHIEF OF STAFF, UNDER SECRETARY OF DEFENSE FOR POLICY: EXTENSION APPROVAL FOR DIRECTIVE-TYPE

and the last remaining PRB-eligible detainee did not receive an initial hearing until September 8, 2016.¹⁷²

EO 13567 established that continued detention would be mandated so long as the concerned detainee posed a “significant” threat to the United States.¹⁷³ Each detainee is entitled to an initial full review within one year,¹⁷⁴ to an in-person hearing, and a file review every six months thereafter. Every three years, the detainee is entitled to another full review with an in-person hearing, although a file review could result in an order of an earlier full review.¹⁷⁵ The PRB is comprised of members from each of the following six agencies: Department of State, Department of Defense, Department of Justice, Department of Homeland Security, Office of the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff.¹⁷⁶

EO 13567 also instituted procedures for a full review, and each detainee is:¹⁷⁷

MEMORANDUM (DTM) 12-005 “IMPLEMENTING GUIDELINES FOR PERIODIC REVIEW OF DETAINEES HELD AT GUANTANAMO BAY PER EXECUTIVE ORDER 13567 (2012) [hereinafter DOD MEMORANDUM].

171. *Periodic Review Secretariat*, U.S. DEP’T OF DEF., <http://www.prs.mil/Review-Information/Initial-Review/> (last visited Jan. 18, 2017) [hereinafter *Periodic Review Secretariat Statistics*]; U.S. DEP’T OF DEF., *Initial Review*, Periodic Review Secretariat, <http://www.prs.mil/Review-Information/Initial-Review/> (last visited Jan. 18, 2018) [hereinafter DoD, *Initial Review*].

172. Periodic Review Secretariat Statistics, *supra* note 171.

173. Exec. Order No. 13567, *supra* note 143, at 13277.

174. As noted, in practice it took approximately three to five years for a detainee to receive an initial review. See Periodic Review Secretariat Statistics, *supra* note 171.

175. Exec. Order No. 13567, *supra* note 143, at 13279.

176. *Id.* at 13280.

177. *Id.* at 13277–78. The file review follows identical procedures except there is no in-person hearing so all statements must be submitted in writing to the Board. *Id.* at 13279.

- i) given advance notice of the hearing date, and is “provided, in writing and in a language the detainee understands” with an unclassified summary of the reasons for continued detention;¹⁷⁸
- ii) assigned a military personal representative (PR) and may acquire private counsel (PC) at no cost to the government;¹⁷⁹
- iii) permitted to make any written or oral statements, secure the statements of witnesses (e.g., family and home-country officials or elders), and answer any questions that were posed by the Board itself.¹⁸⁰

In addition to reviewing the materials or statements provided by the detainee and his PR/PC, the PRB also considers evidence collected and coordinated by the DoD.¹⁸¹ This information is provided by multiple agencies, including the intelligence agencies, and has undergone a review in which all information obtained through torture is presumably removed.¹⁸²

The Board then makes a determination whether continued detention is necessary, and all members of the Board must be in consensus.¹⁸³ If the Board determines that detention is no longer warranted, “the PRB shall also recommend any conditions that relate to the detainee's transfer.”¹⁸⁴ This recommendation is then submitted to a Review Committee comprised of the principals of the six different government agencies who are given thirty days to ask for a review of the PRB's recommendation.¹⁸⁵ The Review Committee may also intervene if the Board is unable to reach a consensus.¹⁸⁶ This author was unable to find any direct evidence of the Review Committee overturning a recommendation made by the Board, but by looking at the speed in which most initial decisions were reached (i.e., within the 30 days in which the Board has been given to overturn a

178. *Id.* at 13277.

179. Exec. Order No. 13567, *supra* note 143, at 13278.

180. *Id.*

181. *Id.*

182. *Id.* The author cannot attest to the quality of this review and therefore makes no assertion as to whether such evidence is indeed considered in the PRB review.

183. *Id.*

184. In practice this has meant that the Board recommends repatriation or resettlement to a third country. On occasion, the Board has made more specific recommendations about the preferred third country or the need for time spent in a rehabilitation center. See Exec. Order No. 13567, *supra* note 143, at 13278.

185. *Id.* at 13279–80.

186. *Id.*

decision), it would seem that at least more often than not, the Review Committee has respected the decision of the Board.¹⁸⁷ However, the fact that the Board cannot order release is a serious threat to its independence, even if the Review Committee uses this power sparingly.

In stark comparison to the “success” rate of CSRTs and ARBs, PRBs have cleared significantly more detainees for transfer.¹⁸⁸ Clearing and transferring detainees are significant factors in determining whether the reviews are robust, because one would expect many mistakes or oversights when individuals are detained on the “hot battlefield.”¹⁸⁹ The PRB determined at least one detainee to be a case of mistaken identity and to not have met the criteria for “unprivileged enemy belligerent,” which the CSRTs failed to acknowledge, and many more have been determined not to pose a significant threat to the United States or at least not a significant enough threat to merit continued detention.¹⁹⁰ Of the sixty-four PRB eligible detainees, thirty-two were cleared in their initial review and did not have to undergo further reviews.¹⁹¹ Additional detainees have been cleared in subsequent reviews.¹⁹²

The different outcomes between PRBs and previous review processes are hard to pinpoint, but there are a few key factors. First, evidence obtained from torture and ill-treatment was generally omitted in the PRBs through a CIDT (Cruel, Inhuman and Degrading Treatment) interagency

187. Periodic Review Secretariat Statistics, *supra* note 171. This statement is based on a review of PRB decisions on the PRS website. *See id.*

188. According to the Heritage Foundation, the CSRTs conducted 572 hearings between 2004 and 2007; of those, only 38 detainees were determined not to be enemy combatants and were sent home. *See* CHRIS EDELSON, *POWER WITHOUT CONSTRAINT* 64 (UNIV. OF WIS. PRESS, 2016); Timothy Book, *Review Process Unprecedented*, 6 THE WIRE 1, 9 (Mar. 10, 2006). According to the Joint Task Force Guantanamo Public Affairs Office, by March 2006 the ARBs had made 463 board recommendations resulting in 14 recommendations for release, 119 recommendations for transfer (i.e. custody in a third country), and 330 decisions for continued detention. Book, *supra* note 188, at 1. In contrast, 36 of the 64 PRB eligible detainees were transferred out of Guantanamo by January 2017. *Guantanamo Periodic Review Boards*, HUM RTS. FIRST, <https://www.humanrightsfirst.org/resource/guantanamo-periodic-review-boards> (last visited Feb. 2, 2018).

189. *See* Book, *supra* note 188, at 9.

190. *See* U.S. DEP’T OF DEFENSE, Guantanamo Detainee Profile, Mustafa Abd-al-Qawi Abd-al-Aziz al-Shamiri, (Sept. 25, 2015), http://www.prs.mil/Portals/60/Documents/ISN434/20150925_U_ISN434_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf. All decisions of the PRB can be found at www.prs.mil; *see generally* Carol Rosenberg, *Guantanamo Periodic Rev. Guide*, MIAMI HERALD (Sept. 21, 2016), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article68333292.html> (for additional breakdown of the statistics).

191. *See generally id.*

192. H. Candace Gorman, *Gitmo by the Numbers*, THE GUANTANAMO BLOG, (Dec 23, 2016, 12:49 PM), <http://gtmoblog.blogspot.com/2016/>.

review, meaning the quality of information should have improved.¹⁹³ Second, the vast majority of detainees fully participated in these hearings alongside their PRs, translators, and often private counsel as well.¹⁹⁴ While this was permitted in past processes like the ARB, detainees did not in fact participate, so it was clearly not encouraged in the same way as it was for the PRBs.¹⁹⁵ The in-person hearing gave detainees an opportunity to interact with the Board members and answer any questions posed to them. The detainees also met regularly with their representatives before hearings in order to be prepared.¹⁹⁶ One must acknowledge that the passage of time, the aging of the detainees, and other factors may also have decreased the perceived threat level of the detainees in the interim years. However, this does not explain the fact that initial decisions by the PRB were overturned by the same PRB within months and it certainly does not explain such occurrences as the acknowledgment of mistaken identities.¹⁹⁷

In addition to the formal differences, these differences also appear to confirm the efficacy—if not the legitimacy—of the PRB process. The PRB appears to approach each case in a more objective way, without a predetermined outcome in mind.¹⁹⁸ While this may be the result of positive political pressure, this author argues that the process itself is more independent and impartial than previous processes. The fact that the Board overturned itself on multiple cases—without interference by principals or other political actors—speaks to a high degree of *de facto* independence. Also, the active (voluntary) participation of most detainees between 2013–16 suggests that the process was perceived to be more impartial than

193. DoD MEMORANDUM, *supra* note 170, at 17. There have been instances where JTF-GTMO assessments appear to refer to evidence. See S. Rep. No. 113-288, *supra* note 11, at 4; *cf.* Guantanamo Detainee Profile, Mohd Farik Bin Amin (Feb. 16, 1975), http://www.prs.mil/Portals/60/Documents/ISN10021/20160324_U_ISN_10021_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf?ver=2016-08-08-115739-550; see S. Rep. No. 113-288, *supra* note 11, at 187, 203. Despite these questionable references, there was at least an interagency process in place to review and remove such tainted evidence. See Exec. Order No. 13567, *supra* note 143, at 13278.

194. Exec. Order No. 13567, *supra* note 143, at 13278; U.S. DEP'T OF DEFENSE, Periodic Review Secretariat, The Periodic Review Board, <http://www.prs.mil/about-the-prb/>.

195. See Book, *supra* note 188, at 1, 9; DoD MEMORANDUM, *supra* note 170, at 10.

196. DoD MEMORANDUM, *supra* note 170, at 15.

197. See, e.g., *Fact Sheet: Falsehood of Closing Guantanamo Bay*, HOUSE ARMED SERVS. COMM., https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/20160826_GTMO_Fact_Sheet.pdf (last visited Mar. 20, 2018).

198. This statement is based on a review of PRB decisions on the PRS website (www.prs.mil). See DoD, *About the Periodic Review Board*, *supra* note 156.

previous processes.¹⁹⁹ The current attitude is unclear as most detainees are not entitled to a full, in-person review for several years, and the *de facto* stop of all transfers out of Guantanamo will certainly affect the perception of the PRB as an independent and impartial process going forward.²⁰⁰

However, the lack of any protection from self-incrimination for detainees is more likely to derail the PRBs at this stage. While it is unsettled whether detainees may raise a Fifth Amendment claim against self-incrimination in the context of Guantanamo, and particularly outside of any criminal process, there is a built-in conflict in the PRB system, which encourages detainees to “come clean” and demonstrate why they have changed, but which does not ensure that any statements made will not be used against them in later proceedings, whether criminal or civil in nature.²⁰¹ When there is a political will to transfer detainees, detainees and their representatives may take the risk to participate in the process. Nonetheless, when transfers cease, detainees will likely determine that the honest admission of past history, encouraged by the Board, are not worth imperiling their *habeas* cases or other future processes if transfer is unlikely.

The early success of this process suggests that PRBs should be continued if they can be sufficiently revised by the Trump administration to better institutionalize independence and impartiality within the system. However, even if PRBs were to be improved, they were only ever intended for the rather small population at Guantanamo, and their complex structure requiring cabinet-level involvement may be unworkable in a more traditional battlefield context.²⁰²

IV. THE FUTURE OF REVIEW PROCESSES IN GUANTANAMO AND BEYOND

As referenced in the introduction to this paper, detention may be necessary during armed conflict, but a deprivation of liberty may also have disastrous humanitarian or economic consequences for the individual and the individual’s family or community.²⁰³ There are times when a person

199. This statement is based on a review of PRB decisions on the PRS website (www.prs.mil).
Id.

200. This is in spite of certain alleged shortcomings such as the continued use of certain unreliable information, such as statements obtained through torture. *See, e.g.*, Center for Constitutional Rights, *Guled Hassan Duran*, (Nov. 30, 2016), <https://ccrjustice.org/guled-hassan-duran>.

201. *See supra* Part III, Section A.

202. Exec. Order No. 13567, *supra* note 143; DoD, *About the Periodic Review Board*, *supra* note 156.

203. *See supra* Part III, Section A.

must be detained—specifically when it is militarily necessary to protect against an imperative threat to security.²⁰⁴

The overarching need for an independent judicial review to prevent detention from becoming arbitrary is well established in international law and jurisprudence.²⁰⁵ However, while this right is essential, there are several reasons why independent and impartial periodic reviews remain equally necessary during armed conflict. For one, judicial review may not be readily available in the heat of battle or in far-off military bases on hostile terrain. This should not exclude the possibility of judicial review, but it reinforces the necessity of appropriate, administrative reviews on a regular basis. In addition, a judicial challenge to detention will almost always be a long, drawn-out court proceeding, which must be initiated by the detainee and is in most cases viewed as a one-off challenge.²⁰⁶ Periodic reviews, on the other hand, when implemented correctly, should provide an automatic and efficient procedure for regularly challenging the necessity of detention.

So, what does this mean for PRBs in Guantanamo or other NIAC review processes going forward? In this author's view it means two things. First, under international law, some kind of periodic review should be required for any (non-POW) law-of-war detention in keeping with the spirit and purpose of IHL. However, because the exact composition and procedures of these boards are not well established in NIAC, it leaves wide discretion to states to analogize to IAC rules, IHRL procedures, and other sources. Second, while reviews are not required as a matter of United States domestic law, long-standing and consistent United States practice establishes that reviews are both necessary and practical tools to deal with NIAC detention populations.²⁰⁷

The processes between the current PRB system and the system provided by GC IV for civilian internees are fairly similar. Both establish administrative boards of multiple members and provide reviews every six months.²⁰⁸ Like GC IV, PRBs are determining whether a person poses an imperative threat to security, although PRBs use the term “significant” threat.²⁰⁹

However, there are still issues where PRBs do not keep up to date with GC IV reviews or other procedural guarantees required by IHL. One key

204. See, e.g., DOD Law of War Manual, *supra* note 144, at § 2.2.

205. Goodman, *Authorization vs. Regulation*, *supra* note 17, at 164.

206. See *supra* Part II, Section B.

207. DOD MEMORANDUM, *supra* note 170, at 18; GC IV, *supra* note 13, at art. 78.

208. DOD MEMORANDUM, *supra* note 170, at 18.

209. *Id.* at 5.

question is whether the PRBs provide “the necessary guarantees of independence and impartiality” as required by GC IV. For example, the fact that the composition of the PRBs may include members of the military seems to be in line with the composition of boards contemplated in both GC III and GC IV, but generally such individuals raise questions with respect to independence, as members of the military are not sufficiently independent within their chain of command.²¹⁰ Likewise, the fact that the Personal Representative (PR) is working directly for the government agency that is also running the reviews is problematic, as it would seem to question their ability to be truly independent of their superior officers, although in practice this has not seemed to affect the ability of detainees to get positive decisions. The most troubling factor may be that the Board does not have the final say for deciding continued detention—due to the oversight of the Review Committee—which suggests that the Board is not truly independent.²¹¹ Because the Review Committee is comprised of political appointees, the entire process is politicized.²¹² It is encouraging that in practice the Review Committee appears to have rarely exercised this power, but it does imbue the process with a lack of independence.

Impartiality is perhaps a more difficult element to assess in the case of PRBs, as the identity of the Board members is generally not common knowledge; thus, it is not clear whether any of the individual board members harbor particular opinions that might put their impartiality into question. As impartiality is often viewed as a subjective test, one could imagine that members of the military and intelligence agencies—the entities responsible for the detention in the first place—do not appear impartial to the detainees. However, the fact that the Board has overturned its own decisions would indicate that the cases are reviewed without a pre-determined outcome in mind, which is a positive signal.²¹³ In order to firmly exclude the possibility of discrimination or other biases, it would be helpful if the impartiality of the board members could be better institutionalized, perhaps by making their identities more public.

Finally, self-incrimination is also an issue. Generally, the Fifth Amendment is only relevant with respect to criminal proceedings, but there is a possibility that even detainees cleared by a PRB might one day face criminal proceedings in a another country, even if the United States chooses not to prosecute them.²¹⁴ As discussed in Part II, this issue is not clear under United States law, especially in such a complex legal setting as NIAC

210. *Id.* at 11.

211. *Id.*

212. See Periodic Review Secretariat Statistics, *supra* note 171.

213. See *supra* Part II.

214. See *supra* Part II.

detention, but there would seem to be some practical if not legal solutions to this problem.²¹⁵ First, the Board could treat the process more like a parole board by assuming all accusations against the detainee may be true, but looking only at the future, not the past. This could be reflected in the types of questions the Board asks and the informal criteria it uses internally to determine the threat-level. It is clear from current practice that the Board spends an undue amount of attention on getting the detainee to “confess his crimes” or to express remorse for the past.²¹⁶

A more formal solution would be to offer testimonial immunity to detainees for any statements made during the PRBs. This novel approach would serve to allay the fears of detainees (and their lawyers) and encourage a more robust participation going forward.

V. CONCLUSION

The initiation of the PRBs—in spite of their shortcomings—provided detainees with a useful objective and served to reduce tensions within the detention facility as detainees focus on achieving a positive result of transfer or release. While this is not a legal reason for maintaining review processes, it reflects the benefits of providing certainty and predictability of the detainee’s legal status. By receiving regular feedback on their situation, detainees are provided not only with an outlet to voice their frustrations but are also given some insight into the reasons they are perceived as a threat. Furthermore, detainees are often given direct recommendations on how to change their behavior to mitigate this perceived threat.²¹⁷

What the PRBs may lack in compliance with international legal norms, they make up for in terms of effectiveness and detainee participation. Moreover, many of the procedural flaws could be addressed to make way for improved PRBs and improved review processes in other future contexts. While the process may need to be tweaked for future detainees, particularly if security detention takes place extraterritorially and closer to the battlefield, the PRB provides an excellent framework on which to build a review process fully compliant with international norms.

The United States spent enormous resources developing detention review processes in Guantanamo—arguably in order to remain compliant with its obligations under international law—and at least as a matter of

215. *See supra* Part II.

216. *See, e.g.*, Unclassified Summary of Final Determination, Abdel Malik Ahmed Abdel Wahab Al Rahabi, Periodic Review Board (Mar. 5, 2014), http://www.prs.mil/Portals/60/Documents/ISN037/140305_U_ISN37_FINAL_DETERMINATION_PUBLIC.pdf?ver=2014-03-12-130840-493.

217. *See supra* Part III.

positive policy.²¹⁸ While none of the review processes have been perfect, the PRBs represent the best model thus far. This is not only due to compliance with international norms, but also because it provides the detainees with some feedback as to the status of their continued detention, and requires the authorities to thoroughly consider the necessity of continuing to detain a specific individual.²¹⁹ While the United States may not consider that these detainees are entitled to such an individual determination due to their status as “unprivileged enemy belligerents,” as a matter of policy, the United States should provide independent and impartial review processes to ensure that it is not detaining persons without the military necessity to do so.

218. *See supra* Part II.

219. *See supra* Part II.